In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1641

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARTIN EDWARD WOODLAN,
Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DOHERTY & THOMAS, P.C.
PHILIP J. DOHERTY
225 South Main Street
Royal Oak, Michigan 48067
(313) 543-3404
Attorney for Defendant

E. L. Mendenhall, Inc., 926 Cherry St., Kansas City, Mo. 64106, 816-421-3030

INDEX

Index to Authorities Cited

CASES

STATUTES

CONSTITUTION

TEXTS

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. _____

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARTIN EDWARD WOODLAN,
Defendant.

PETITION FOR WRIT OF CERTIORARI

Now comes MARTIN EDWARD WOODLAN, by and through counsel, PHILIP J. DOHERTY of DOHERTY & THOMAS, P.C., respectfully submitting this Petition for Writ of Certiorari and says as follows:

OPINION

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 527 F2d 608 (1976). A copy of the opinion of the United States Court of Appeals for the Sixth Circuit is included in the Appendix to this, Petitioner's Petition for Writ of Certiorari [A1-A3].

JURISDICTION

The grounds on which the jurisdiction of this Honorable Court is invoked by your Petitioner include the following:

A) On January 9, 1976, the United States Court of Appeals for the Sixth Circuit affirmed the con-

viction of MARTIN EDWARD WOODLAN in the case of *United States* v. *Martin Edward Woodlan*, 527 F2d 608 (1976).

B) The statutory provision which confers jurisdiction on this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit is contained in 28 USCA §1254(1), which reads as follows:

> "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

CONSTITUTIONAL PROVISION

The constitutional provision which the above entitled Petition involves is as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF FACTS

On March 19, 1974, Federal Officers obtained and executed a search warrant at 27304 Phipps Street in Inkster, Michigan. The warrant authorized the search of the premises for an unknown quantity of dynamite and blasting caps. No explosives or blasting caps were ever found.

However, as a result of the search, Officers seized ten firearms and an undisclosed amount of suspected narcotics.

On June 18, 1974, after the Government was notified that the cause had been placed on the no progress docket and was scheduled for dismissal, the Government obtained a three (3) count Indictment alleging violations of: COUNT ONE, 26 USC 5845, 5861 (d), 5871; COUNT TWO, 21 USC 841 (a)(1); and COUNT THREE, 21 USC 841 (a)(1).

On September 3, 1974, trial commenced before a jury and the trial court granted the defense Motion to Dismiss count three.

On September 6, 1974, the jury retired to consider a verdict as to the remaining two counts.

After deliberations, the Court granted a mistrial as to count two and the jury returned a verdict of guilty on count one only.

After sentencing, Appellant took timely Notice of Appeal.

The United States Court of Appeals for the Sixth Circuit affirmed the conviction of the United States District Court on January 9, 1976.

REASONS FOR GRANTING THE WRIT

The instant petition treats a Federal Constitutional question of vital importance to be decided by this Honorable Court.

The question presented is: "The search warrant in this matter issued without probable cause and evidence derived therefrom must be suppressed."

The Affidavit for the search warrant in this matter is annexed hereto in the Appendix, as is the warrant to search.

Appellant's counsel at trial, for reasons unknown to Appellate counsel, failed to challenge the Affidavit or warrant or any evidence derived therefrom. Appellant is therefore compelled and had to challenge the affidavit and warrant for the first time on appeal.

Thus, without either a pre-trial motion or an objection at the trial, the appellate courts are generally foreclosed from review of such a question unless it is clear from the record that *PLAIN ERROR* was committed. Appellant asserts that such is the case here, and this Court should review the question. *United States* v. *Nikrasch*, 367 F2d 740, 743-744 (7th Cir, 1966); *United States* v. *Asendio*, 171 F2d 122, 124-125 (3rd Cir, 1948); *United States* v. *Love*, 472 F2d 490, 497 (5th Cir, 1973); *United States* v. *Fisher*, 440 F2d 654 (4th Cir, 1970); Wright, Federal Practice and Procedure, Criminal §678, note 41 (1969 ed).

It is fundamental constitutional law that a search warrant may issue only upon a showing that there is probable cause to believe that the item sought is located on the premises for which the search warrant is requested. *United States* v. *United States District Court*, 407 US 297, 316-317 (1972); *Aguilar* v. *Texas*, 378 US 108, 112 (1964); *Nathanson* v. *United States*, 290 US 41, 47 (1933).

Of paramount importance in the consideration of the issue advanced here is the reasoning employed by the Supreme Court in the cases of *Aguilar* v. *Texas*, supra; *United States* v. *Harris*, 403 US 573 (1971); and *Spinelli* v. *United States*, 393 US 410 (1969). Of

further importance, is the idea that at proceedings subsequent to the issuance of a search warrant, probable cause cannot be rehabilitated after the fact; stated otherwise, a search warrant is valid only if probable cause has been shown to the magistrate, and an inadequate showing may not be rescued by postsearch testimony on information known to the searching officers at the time of the search. Cf. *United States* v. *Chavez*, 482 F2d 1268, 1270 (5th Cir, 1973); Note, The Supreme Court—1970 Term, 85 Harvard Law Review 40, 55 (1971); Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 85 Harvard Law Review 825 (1971).

The record contains no evidence that any information outside the affidavit was presented to the magistrate at the time the search warrant application was made. The fundamental purpose of a search warrant is to place behind the force of the warrant a detached magistrate's objective evaluation of information. A magistrate cannot evaluate information not known to him and the propriety of his action should be determined from what he knew, not from what someone else knew or later came to know. An analysis of the validity of the search warrant must be made from the Affidavit alone, because nothing else was considered by the magistrate. *Aguilar* v. *Texas*, supra; *Giordenello* v. *United States*, 357 US 480 (1958); *Wangrow* v. *United States*, 399 F2d 106 (8th Cir, 1968), cert den 393 US 933 (1969). A possible exception is evidence tending to discredit or impeach the assertions of the Affidavit. *United States* v. *Roth*, 391 F2d 507 (7th Cir, 1967).

Neither *Whitely* v. *Warden*, 401 US 560 (1971), nor *Draper* v. *United States*, 358 US 307 (1959), can support a contrary view. It must be kept in mind that test-

ing the validity of a search warrant is different from testing the validity of a search.

Additionally, the information or tip from the informant is essential to the validity of the warrant. This follows, since that is a search warrant and therefore must contain reasons for believing that a particular item is to be found in a particular place. The only averment linking Appellant's house with criminal activity is the averment in the informant's allegation that Appellant kept explosives at his residence. There are no allegations that Appellant was involved in anything else which would constitute probable cause sufficient to issue a search warrant for explosives. Appellant was, at the time the warrant was issued, a member of a motorcyle club. Yet if the warrant issued upon this, it would amount to issuance of a warrant upon the basis of reputation alone and this is forbidden by *Nathanson* v. *United States*, supra. See also, *United States* v. *Harris*, supra, 403 US at 582. Hence, this case may be analyzed in accordance with the line of decisions wherein tips or information gained from informants were essential to the validity of the search warrant. See, e.g., *United States* v. *Olt*, 492 F2d 910 (6th Cir, 1974).

Prior to *United States* v. *Harris*, supra, the obvious starting place for analysis was *Aguilar* v. *Texas*, supra. In *Harris*, the plurality opinion of Chief Justice Burger de-emphasizes the significance of *Aguilar* and takes as its landmark, *Jones* v. *United States*, 362 US 257 (1960). This part of the Chief Justice's opinion was joined in by only two other Justices, however. Moreover, the Chief Justice's opinion makes it clear that *Aguilar* is not being overruled. 403 US 573, 577. Additionally, several circuits view *Aguilar* as the proper

starting point despite *Harris*. *United States* v. *McNally*, 473 F2d 934 (3rd Cir, 1973); *United States* v. *Davenport*, 478 F2d 203 (3rd Cir, 1973); *LeDent* v. *Wolff*, 460 F2d 1001 (8th Cir, 1972); *United States* v. *Black*, 476 F2d 267 (5th Cir, 1973); *United States* v. *Marihart*, 472 F2d 809 (8th Cir, 1972); *United States* v. *Smith*, 462 F2d 456 (8th Cir, 1972); *Tabasko* v. *Barton*, 472 F2d 871 (6th Cir, 1972).

In *Aguilar* the Court held that where an affidavit supporting a search warrant is based on hearsay information, the magistrate must be informed of two sets of circumstances: (1) some of the facts from which the informant has concluded that the items to be seized are where he claims they are; (2) some of the facts from which the officer concludes that the informant is credible or his information reliable. 378 US 108 (1964).

The Affidavit here is deficient under this standard, because no information was given to the magistrate regarding the first set of circumstances. Nothing was said regarding the basis on which the informant concluded that there were explosives at Appellant's house. The Affidavit also fails the second part of the *Aguilar* standard, since the other averments in no way deal with the credibility of the unnamed informant or attempt to show that his information was reliable. See *Spinelli* v. *United States*, supra, 393 US at 410-418; *United States* v. *Acosta*, 501 F2d 1330 (5th Cir, 1974).

This is not the end of a proper analysis however, since *Aguilar* has been supplemented by *Spinelli*. In that case the Supreme Court held that an affidavit not satisfying the *Aguilar* standard is still acceptable if the averments in the Affidavit, aside from the tip or informant's information, so corroborate the information that it is "as reliable as one which passes *Aguilar's* re-

quirements when standing alone." 393 US at 416. When, as here, the manner in which the informant gathered his information is not told to the magistrate, the Court in *Spinelli,* held:

> ". . . (I)t is especially important that the tip described the accused's criminal activity in sufficient detail, that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." 393 US at 416.

Spinelli used *Draper* v. *United States,* supra, as the standard for determining whether the tip described the criminal behavior in sufficient detail. In *Draper,* which as mentioned before, involved probable cause to arrest without a warrant, the tip stated the address in Denver where the suspect had taken up residence; that the suspect had gone to Chicago on September 6, 1956, by train; that he was going to bring back three ounces of heroin; that he would return by train either on the morning of September 8, 1956, or the next morning; that the suspect was a negro of light brown complexion, 27 years old, 5 feet 8 inches tall, weighed about 160 pounds, and would be wearing a light colored raincoat, brown slacks and black shoes; that he would be carrying a tan zipper bag; and that he habitually walked fast. The obvious intent of the standard announced in *Spinelli* is to give the magistrate sufficient detail to make it apparent that the informant gathered his information in a reliable manner and was not simply repeating unfounded rumors.

The mere statement that "at 27304 Phipps, Inkster, Michigan the residence of Martin Woodlan, is being concealed a quantity of explosives and blasting caps," does

not describe the criminal behavior in the detail required by *Spinelli.* Likewise, the handwritten insertion that "storage of dynamite in a residence is illegal pursuant to federal statute and regulations under Title 18 Section 841(j)" is a misstatement of the law. That section holds:

> "It shall be unlawful for any person to store any explosive material in a manner not in conformity with regulations promulated by the Secretary. In promulgating such regulations, the Secretary shall take into consideration the class, type, and quantity of explosive materials to be stored, as well as the standards of safety and security recognized in the explosives industry."

This final averment adds absolutely nothing to the Affidavit nor to probable cause for the issuance of the warrant.

Spinelli should not be read, however, as saying that the only way to make up for an Affidavit deficient in the light of *Aguilar* is to describe the criminal behavior in a very detailed manner. The Court goes on to state:

> "This is not to say that the tip was so insubstantial that it could not properly have counted in the magistrate's determination. Rather, it needed some further support. When we look to other parts of the application, however, we find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed." 393 US at 418.

While Appellant does not think that *Harris* changed the standards of *Aguilar* and *Spinelli,* it may be useful

to analyze the present case against the factual setting of *Harris*.

Chief Justice Burger's plurality opinion in *Harris* relies upon *Jones* v. *United States*, supra, for setting the standard for the quantum of information necessary to support a belief that an unidentified informant's information is truthful. The Affidavit in *Jones* concerned the tip of an unidentified informant who claimed that he had recently purchased narcotics from the defendant. The tip also described the apartment where the informant alleged he had purchased the narcotics. The remainder of the Affidavit swore that the informant had given information to the affiant before and that information was accurate, and that the same information was given by other informants. Moreover, the tip itself was an admission against penal interest. In applying *Jones* to the facts in *Harris*, the Chief Justice characterizes *Jones* as stating that the affidavit is sufficient if there is a substantial basis for crediting the hearsay of the informant. The affidavit in *Harris* related a tip that the informant had purchased illicit whiskey from Harris at a specific house. It also stated that Harris had a reputation personally with the affiant as being a trafficker in nontaxpaid distilled spirits, that the affiant had received information from a variety of sources concerning Harris' activities, that illicit whiskey had actually been found on Harris' premises before, and that the affiant found the informant to be "prudent". The Chief Justice found substantial basis for crediting the hearsay here for the following reasons: first, it purported to relate personal observations of the informant; second, it recited prior criminal behavior; and third, the statement of the informant was against penal interest. 403 US at 581, 583. The Chief Justice also noted that the affi-

davit contained no averment that the informant had previously given correct information as did the affidavit in *Jones*. The absence of such an averment, however was found not essential to meeting the standard set down by *Jones*. 403 US at 581-582.

Applying the three factors critical to upholding the affidavit in *Harris* to the affidavit before this Court, it can be seen that only the assertion "I received information from a reliable informant who had been reliable at least twenty (20) times in the past and has supplied information that has led to two (2) convictions in Federal Court. . ." meets one prong of the three-pronged *Harris* test. The informant does not purport to relate his own personal observations; there is no recital of prior criminal acts by the Appellant to support a reputation for possession of explosives; and the statement of the informant is in no way against his penal interest. Hence, the affidavit in this cause does not contain the pivotal facts relied upon by Chief Justice Burger in *Harris*.

Therefore, the affidavit supporting the search warrant did not give the magistrate probable cause to issue the warrant and the warrant was therefore issued without probable cause and all evidence obtained from the Phipps address must be suppressed as obtained in violation of the Appellant's Fourth Amendment rights.

RELIEF

Wherefore, Petitioner respectfully requests this Honorable Court to grant Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

DOHERTY & THOMAS, P.C.
PHILIP J. DOHERTY
225 South Main Street
Royal Oak, Michigan 48067
(313) 543-3404
Attorney for Defendant

State of Michigan)
) ss
County of Oakland)

AFFIDAVIT

I, PHILIP J. DOHERTY, after being first duly sworn, do hereby depose and state that I have read the foregoing PETITION FOR WRIT OF CERTIORARI, and that the same is true of my own personal knowledge, except as to those matters stated upon information and belief, and as to those matters, I believe them to be true also.

Further deponent sayeth not.

Respectfully submitted,

DOHERTY & THOMAS, P.C.
PHILIP J. DOHERTY
225 South Main Street
Royal Oak, Michigan 48067
(313) 543-3404
Attorney for Defendant

Subscribed and sworn to before me this 5th day of April, A.D., 1976.

EDWARD ALLEN TRUDEAU
Notary Public Acting in Oakland County, Michigan

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,
v.
Martin Edward WOODLAN,
Defendant-Appellant.
No. 75-1539.
United States Court of Appeals,
Sixth Circuit.
Argued Oct. 13, 1975.
Decided Jan. 9, 1976.

The United States District Court for the Eastern District of Michigan, Robert E. DeMascio, J., found defendant guilty on charge of unlawfully possessing a machine gun, and he appealed. The Court of Appeals held that (1) substantial evidence showed that the Spitfire possessed by defendant was a "machine gun," including proof that the weapon was capable of being modified in two minutes to fire automatically, and (2) the only knowledge required to be proved was knowledge that the instrument possessed was a firearm, and it was unnecessary to show knowledge that the firearm was not registered or that it was required to be registered.

Judgment affirmed.

1. **Internal Revenue (Key) 2449**

Substantial evidence supported finding that defendant unlawfully possessed a "machine gun," where the Spitfire rifle in defendant's possession was capable of being modified in two minutes to fire automatically. 26 U.S.C.A. (I.R.C.1954) § 5845(b).

2. Internal Revenue (Key) 2447

In prosecution for unlawful possession of a firearm, the only knowledge required to be proved was knowledge of defendant that the instrument possessed by him was a firearm, and it was unnecessary to prove knowledge that the firearm was not registered or that it was required to be registered. 26 U.S.C.A. (I.R.C.1954) §§ 5841, 5845, 5861(d), 5871.

James C. Thomas, Philip J. Doherty, Doherty, Thomas, Essicks & Lippman, Royal Oak, Mich., for defendant-appellant.

Ralph B. Guy, Jr., U. S. Atty., Gordon S. Gold, Richard L. Delonis, Detroit, Mich., for plaintiff-appellee.

Before PHILLIPS, Chief Judge, MARKEY, Chief Judge of the Court of Customs and Patent Appeals,* and LIVELY, Circuit Judge.

PER CURIAM.

Martin Edward Woodlan appeals from his conviction for unlawful possession of a machine gun. The jury found him guilty under the first count of an indictment charging him with knowingly possessing a "firearm," as defined in 26 U.S.C. § 5845. The firearm was described in the indictment as a "Spitfire Arms, .45 caliber, 9mm [sic] automatic rifle, serial number 1562," which had not been registered to Woodlan in the National Firearms Registration and Transfer Record (26 U.S.C. § 5841) as required by 26 U.S.C. §§ 5861(d) and 5871.

On appeal Woodlan contends that the evidence presented at the trial fails to show that the Spitfire was a

---

*Honorable Howard T. Markey, sitting by designation.

"machine gun" as defined by 26 U.S.C. § 5845(b) and that the prosecution failed to prove that he knowingly possessed an illegal firearm.

[1, 2] We find these contentions to be without merit. The record contains substantial evidence that the weapon possessed by Woodlan was a "machine gun" as defined by the statute, capable of being modified in two minutes to fire automatically. *See United States* v. *Williams*, 427 F.2d 1031 (9th Cir. 1970), *cert. denied*, 400 U.S. 909, 91 S.Ct. 153, 27 L.Ed.2d 148 (1970). "The only knowledge required to be proved was knowledge that the instrument possessed was a firearm." *United States* v. *Freed*, 401 U.S. 601, 607, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971). The act does not require knowledge that the firearm was not registered or that it was required to be registered. *United States* v. *Sanders*, 462 F.2d 122, 124 (6th Cir. 1972).

Woodlan further contends that the search warrant involved in this case was issued without probable cause and that the District Court committed plain error in not suppressing evidence obtained through the unlawful search.

We hold that the record fails to establish plain error. There is no merit in the contention that the affidavit to the search warrant fails to meet the requirements of *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). *See United States* v. *Jenkins*, 525 F.2d 819 (6th Cir. 1975).

Having found probable cause existed we find no need for discussion of Woodlan's failure to move to suppress the evidence or to object to its admission at trial.

The judgment of the District Court is affirmed.

Form No. 100

CRIMINAL DOCKET

ROBERT DEMASCIO

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.: Robert E. Cox, Gordon S. Reed, asst.
vs.	
HARRY WOODLAN 3715 Cadillac Tower Detroit, MI 48226 Bond 6/18/74	
	For Defendant: Edward Hayes
Vio: Section 5861 (d), Title 26, USC (Possession of machine gun which was not registered)	3715 Cadillac Tower Detroit, MI 48226 962-
Section 5845, 5871, Title 26, USC	
SEction 841(a)(1), 841 (a)(2), Title 21, USC	

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISB.
Fine,					
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witness,					

1974 DATE	PROCEEDINGS
March 20	COMPLAINT, filed.
" 20	Deft. Woodlan appeared on complaint, appeared without counsel, preliminary exam. set for April 9/74, bond set at $5,000.00 personal, released. Pickett, M.
" 20	ORDER re release, filed and entered. " "
" 20	PERSONAL bond in $5,000.00, filed.
Apr 9	NOTICE that the adjournment of preliminary examination is set for May 9/74.

DATE 1974	PROCEEDINGS	CLERK'S FILES PLAINTIFF	CLERK'S FILES DEFENDANT
May 13	5. NOTICE re adjournment of preliminary examination to June 10/74.		
Jun 12	6. ORDER of dismissal for no progress as to deft Woodlan, with cancellation of bond, filed and entered.		Kennedy,
" 12	7. PROOF of service re order.		
Jun 18	8. INDICTMENT and report.		
Jul 2	-- ARRAIGNMENT on indictment. Deft rep by counsel, stands mute on plea of not guilty entered. Bond continued.		Hackett, M.
" 2	9. DEFT Woodlan's acknowledgment of indictment.		
" 2	10. APPEARANCE of atty as to deft Woodlan.		
" 19	11. NOTICE for trial has been set for Sept 3/74 at 9 a.m.		
Aug 19	12. ORDER for discovery and inspection incriminal cases, filed and entered.		Kennedy,
Sept 3	-- JURY trial begins; Jury empaneled and sworn. Adjourned to Sept 4/74 at 9 am.	"	"
" 4	-- JURY trial continues. Adjourned to Sept 5/74 at 2 p.m.	"	"
" 5	-- JURY trial continues. Motion to dismiss Count III granted. Motion to dismiss Counts I & II denied. Adjourned to Sept 6/74.	"	"
" 6	-- JURY trial continues. Court charges the jury and orders them to deliberate. Jury returns verdict of guilty as to Ct. I Court declares mistrial as to Ct II.		DeMascio, J.
" 9	13. JURY verdict.		
" 9	14. DEFT'S request for instructions.		

A6

United States District Court

FOR THE

EASTERN DISTRICT OF MICHIGAN - SOUTHERN DIVISION

Mar 19 4 29 PM '74

HENRY H. HARRISON, CLERK

Magistrate's Docket No. 18-1321

Case No.

UNITED STATES OF AMERICA

vs.

27304 Phipps
Inkster, Michigan

AFFIDAVIT FOR
SEARCH WARRANT

BEFORE Honorable Barbara K. Hackett
Name of Magistrate

1027 Federal Building
Address of Magistrate

The undersigned being duly sworn deposes and says:

That he (has reason to believe) (~~has reason to believe~~) that ~~on the premises known as~~ (on the premises known as)

27304 Phipps, Inkster, Michigan, further described as a white front home with black brick sides. Being the sixth (6th) house from the east side of the deadend of Phipps and on the north side of the street.

TO BE SEARCHED: Entire house and all appurtenances.

in the Eastern District of Michigan

there is now being concealed certain property, namely an unknown quantity of dynamite and blasting caps.
here describe the property

which are evidence of a crime being held in violation of Title 18 U.S.C. Section 842(j)
here give alleged grounds for search and seizure

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

That on March 19, 1974 I received information from a reliable informant who has been reliable at least twenty (20) times in the past and has supplied information that has led to two (2) convictions in Federal Court that at 27304 Phipps, Inkster, Michigan the residence of Martin Woodlan is being concealed a quantity of explosives and blasting caps.

Storage of explosive in a residence is illegal pursuant to Federal & State Regulations under Title 18 Section 842 (J)

Edward P. Hemsath
Signature of Affiant

EDWARD P. HEMSATH
S/A - Bureau of Alcohol, Tobacco & Firearms
(Official Title, if any)

Sworn to before me, and subscribed in my presence, March 19, 1974

A7

Search Warrant

United States District Court

FOR THE

EASTERN DISTRICT OF MICHIGAN - SOUTHERN DIVISION

UNITED STATES OF AMERICA

vs.

27304 Phipps
Inkster, Michigan

Docket No. 18-1321
Case No.

SEARCH WARRANT

To EDWARD P. HEMSATH or any other authorized agent

Affidavit(s) having been made before me by EDWARD HEMSATH

that he has reason to believe that { ~~on the premises known as~~ / on the premises known as }

27304 Phipps, Inkster, Michigan, further described as a white front home with black brick sides. Being the sixth (6th) house from the east side of the deadend of Phipps and on the north side of the street.

in the Eastern District of Michigan

there is now being concealed certain property, namely an unknown quantity of dynamite and blasting caps; in violation of Title 18 U.S.C. Section 842(j)
here describe property

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of --Two--days
(not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search { in the daytime (6:00 a.m. to 10:00 p.m.) / ~~at any time in the day or night~~* } and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before ----Barbara K. Hackett------ as required by law.
Federal Judge or Magistrate

Dated this day of , 19

Judge (Federal or State Court of Record or Federal Magistrate)

*The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." (Rule 41(c)). A statement of grounds for reasonable cause should be made in the affidavit(s) if a search is to be authorized "at any time (day or night)" pursuant to Rule 41(c).

A8

RETURN

I received the attached search warrant MARCH 19, 19 74, and have executed it as follows:

On MARCH 19, 1974 at 8:15 o'clock P M, I searched the person or premises described in the warrant and

I left a copy of the warrant with KATHY WOODMAN
Name of person searched or owner or "at the place of search"

together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1- SPITFIRE, .45 CAL SERIAL 1562
1- 357 COLT PYTHON BLUE 85969
1- S&W K-38 BLUE 32135
1- S&W, 32 CAL CLERKE 091500
1- WALTHER, 380 141472 SM
1- DISASSEMBLED RG 31.38 CAL 016683
1- WINCHESTER 1200 12 GA PUMP N66087
1- 22 CAL ZIP GUN
1- BROWNING HIGH POWER 9MM 69C4229
1- COLT .32 AUTO 52279
1- LB BLACK POWDER
2- BOTTLES SUSP NARCO

3 RED SUSP NARCO PILLS
STONES RED POWDER SUSP NARCO
1- PLAINFIELD .30 CAL M.I. X-48L
1- BAG YELLOW CRYSTALS MISC NARCO SUSP NARCO POWD.
1- BAG WHITE SUSP NARCO

This inventory was made in the presence of JAMES QUEARRY

and

SGT TERRY ALTMAN

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

Edward F. Hickman

Subscribed and sworn to and returned before me this day of , 19

Federal Magistrate

No. 75-1641

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARTIN EDWARD WOODLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1641

MARTIN EDWARD WOODLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a warrant to search his home was issued without probable cause and that the district court committed plain error in not suppressing the evidence seized as a result of the search.

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possessing an unregistered firearm, in violation of 26 U.S.C. 5861(d). Imposition of sentence was suspended and petitioner was placed on two years' probation on condition that he pay a fine of $2,500 within 30 days. The court of appeals affirmed *per curiam* on January 9, 1976 (Pet. App. A1-A3; 527 F. 2d 608). The petition for a writ of certiorari was filed on April 7, 1976, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. In any event, the question raised does not merit further review.

1. On March 19, 1974, a United States Magistrate issued a search warrant authorizing a search of petitioner's residence (Pet. App. A7). The affidavit submitted in support of the warrant stated that an informant who had proven reliable on at least twenty occasions and whose information had led to two federal convictions had notified the Bureau of Alcohol, Tobacco and Firearms that an unknown amount of dynamite and blasting caps was being stored on petitioner's premises, in violation of 18 U.S.C. 842(j) (Pet. App. A6). A search conducted pursuant to the warrant uncovered ten firearms and a quantity of narcotics.[1] No explosives or blasting caps were found.

Petitioner did not file a pretrial motion to suppress the seized evidence, nor did he object to its introduction at trial. On appeal, the court of appeals rejected his claim that the search warrant had been issued without probable cause and that the trial court had committed plain error in admitting the evidence.

2. The trial court properly admitted into evidence the firearm seized pursuant to the search warrant. Defense counsel, rather than the court, has the obligation to challenge the admissibility of evidence alleged to have been illegally obtained (see *Kuhl* v. *United States*, 370 F. 2d 20, 26 (C.A. 9) (*en banc*); cf. *Estelle* v. *Williams*, No. 74-676, decided May 3, 1976, slip op. 11), and an unjustified failure to make a timely motion to suppress constitutes a waiver of that right. See Fed. R. Crim. P. 41(f) and 12(b)(3);

[1]Petitioner was indicted for possession of one of the firearms. He was also charged with possessing methamphetamine (count two) and sodium phenobarbital (count three) with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) and (2). The trial court granted petitioner's motion to dismiss count three at the close of the government's case (Tr. 160) and declared a mistrial on count two when the jury was unable to reach a verdict.

United States v. *Mauro*, 507 F. 2d 802, 805-807 (C.A. 2) certiorari denied, 420 U.S. 991; *United States* v. *Ceraso*, 467 F. 2d 653, 659 (C.A. 3); *United States* v. *Blackwood*, 456 F. 2d 526, 529 (C.A. 2), certiorari denied, 409 U.S. 863; *Farnell* v. *Solicitor General of the United States*, 429 F. 2d 1318 (C.A. 5); *Darden* v. *United States*, 405 F. 2d 1054, 1055 (C.A. 9); *United States* v. *Phillips*, 375 F. 2d 75, 78-79 (C.A. 7), certiorari denied, 389 U.S. 834.

Petitioner has offered no justification for his failure to object to the admission of the evidence either before or during trial. See Pet. 4. He unquestionably was aware that the firearm had been seized pursuant to a search warrant and that the government intended to introduce it at trial. In these circumstances, petitioner's claim may not be raised for the first time on appeal.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.

[2]Petitioner contends (Pet. 5) that "[t]he record contains no evidence that any information outside the affidavit was presented to the magistrate at the time the search warrant application was made." This is not surprising in light of petitioner's failure to challenge the validity of the search warrant in the district court.